No. 90-92

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

AMERICAN PETROLEUM INSTITUTE,
Petitioner,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

The government's central arguments in opposition to the petition, broadly put, are that this case is factbound and that it does not present an important question of administrative law. Neither assertion has merit. Only two facts are necessary to resolve this case, and they are undisputed: (1) the court of appeals created a rationale for the agency's Final Rule out of briefs and other materials not published with the Final Rule, and (2) the agency subsequently adopted that rationale in its "Notice of Compliance" with the court of appeals' remand. The issue of administrative law raised herein is serious—it is the question whether, in the guise of expansively interpreting Step Two of the analysis in *Chevron U.S.A.* v. *NRDC*, 467 U.S. 837 (1984), a court of appeals can ef-

fectively accomplish what it would otherwise be forbidden to do by *SEC* v. *Chenery Corp.*, 332 U.S. 194 (1947). This question is all the more important in that it arises in a particularly significant context—a rulemaking involving a statute of national importance.

1. The government concedes, as it must, that the court of appeals relied only on the briefs submitted by EPA's attorneys, and on "record materials" other than the Final Rule, in developing its explanation as to why the agency's Final Rule was reasonable. Opp. 10. The government nevertheless suggests that in so doing, the court of appeals is guilty of nothing more than including "*dictum*" in its opinion. *Id.*

The government's suggestion simply ignores the essential point both of the petition and of Judge Silberman's concurrence. A reviewing court's decision to opine on the reasons an agency *might have had* for adopting a rule—and then to hold that such a rationale is sufficient to satisfy *Chevron* Step Two—is obviously more than mere *dictum*.[1] It is a clear signal to the agency that it need not articulate in its Final Rule a defensible reason for adopting a particular statutory construction, at least so long as the agency's general counsel is able to persuade the court of appeals after the fact that good reasons lay behind the agency's decision. The court of appeals' decision is flatly inconsistent with the core *Chenery* principle that precludes reviewing courts from upholding agency decisions on grounds other than those advanced by the agency in its Final Rule. See Pet. 11-13.

2. The government also errs in suggesting that the court of appeals' opinion did not unduly influence the agency in its deliberations on remand. To be sure, the court of appeals' decision to remand in theory gave EPA

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[1] See App. 14a-17a (majority improperly reached *Chevron* Step Two, and, having done so, developed a rationale never advanced in the Final Rule to reject, on the merits, CMA's arguments that the Rule was unreasonable).

the opportunity to reconsider and even to withdraw its decision. As Judge Silberman observed, however, by providing the agency with a pre-approved judicial rationale for its Final Rule, the court's remand was in reality "an empty gesture, one which conforms to principles of judicial review of agency policymaking only in form." App. 41a. Petitioner's central point, which the government simply sidesteps, is that no agency can be expected to resist the temptation to resubmit to a court the very explanation that the court itself has clearly indicated it will accept in order to uphold an action already taken by the agency. See Pet. 10, 14-16. The question is not one of formal "constraint" (Opp. 10); rather, it is one of the judiciary providing the agency with an irresistible "incentive" (Pet. 15) to preserve its Final Rule by adopting the court's pre-approved rationale.[2]

The Agency's decision to supply the court of appeals with a "lengthy document" in response to the remand does not change the analysis. Opp. 11. The government does not dispute that the central—and only essential—point of the rationale adopted in EPA's Notice of Compliance was the precise point made by the court of appeals. The fact that the agency embellished that point with a discussion of other, largely, precatory, policy goals is immaterial—once the court of appeals laid out a clear path to uphold the agency's end result, there was no question but that the agency would take that path.

3. Even though the agency's action on remand was effectively foreordained once the court of appeals handed down its opinion, it does not follow, as the government maintains (Opp. 11-12), that no meaningful relief can

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[2] The government's self-serving suggestion that EPA could have sought rehearing if it felt its authority was unduly constrained (Opp. 11) is starkly at odds with the reality of the administrative process. No agency can reasonably be expected to demand that a reviewing court play hardball when that court is content to play catch with the agency.

be granted in this case. It is mere speculation to assert, as the government does, that EPA would simply reaffirm the Final Rule after a decision by this Court pointing out the unacceptability of undue congressional and judicial influence that have tainted the agency's previous deliberations; indeed, if this Court were to order a fresh and independent look, EPA might yet reach a different result. See Pet. 16-17 n.9. More fundamentally, however, the government's argument proves too much. It could be used to deny litigants review by this Court whenever a court of appeals uses the strategy employed in this case to salvage inadequate agency action, thereby encouraging repetition of this improper procedure in future cases.

4. Finally, the fact that the government cites three recent decisions by the D.C. Circuit in which the court of appeals apparently did not employ this improper procedure changes nothing. As explained in the petition (Pet. 17-18), the technique employed below will not supplant the proper mode of review in every case; rather, courts will be tempted to use it in those cases where the panel agrees with the result reached by the agency, but wants to make sure that, on remand, the agency provides an acceptable explanation that will preserve the original result. When a majority disagrees with or is indifferent to the agency's result, it can be expected to act as it did in the cases cited by the government. When it faces a situation analogous to the one in this case, however, the decision below will stand as an unambiguous and powerful precedent for enabling the majority to achieve through *Chevron* what *Chenery* would otherwise forbid.

CONCLUSION

For the reasons set forth above and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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